Supreme Court, U.S.
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No. 95-746

In the Supreme Court of the United States

OCTOBER TERM, 1995

JAMES LINSCOMB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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16 pp

QUESTIONS PRESENTED

1. Whether the district court committed plain error in not instructing the jury that, to convict petitioner of violating 18 U.S.C. 1014, it was required to determine that petitioner's false representation to a bank had been material.

2. Whether the Double Jeopardy Clause was violated by petitioner's conviction, in a single prosecution, of committing bank fraud, in violation of 18 U.S.C. 1344, and of making a false representation to a bank, in violation of 18 U.S.C. 1014.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is unpublished, but the decision is noted at 56 F.3d 1386 (Table). The order of the district court denying petitioner's post-trial motions (Pet. App. 11a-27a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 1995. The court of appeals entered an order on August 11, 1995, modifying the opinion but otherwise denying rehearing. Pet. App. 31a-32a. The petition for a writ of certiorari was filed on November 9, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on one count each of conspiracy, in violation of 18 U.S.C. 371, bank fraud, in violation of 18 U.S.C. 1344, and submitting a false statement to a federally insured financial institution, in violation of 18 U.S.C. 1014; and on three counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i). He was sentenced to a total of 46 months' imprisonment, to be followed by three years' supervised release. He was also fined $15,000 and ordered to pay restitution in the amount of $350,000. Gov't C.A. Br. 2. The court of appeals affirmed. Pet. App. 1a-10a.

1. In 1981, a corporation operated by petitioner purchased certain land in Texas (the Dizbo property) for development. In 1987, the bank holding the mortgage on the Dizbo property, Texas Commerce Bank, foreclosed and purchased the land, but petitioner later arranged to repurchase the property from that bank for $1.3 million. Petitioner asked Marshall Willey to help him obtain a loan that would cover both the actual purchase price of the Dizbo property and additional funds for petitioner's own use. Pet. App. 15a.

Willey went to a friend, Bill Wilder, who was president of Bedford Savings Association (Bedford Savings). Willey agreed to give Wilder $100,000 if Bedford Savings made a $1.9 million loan to petitioner. The Bedford Savings loan committee was not informed that the amount of the loan exceeded the purchase price of the land. Pet. App. 15a-16a.

The initial loan settlement papers prepared by the title company showed that the difference of just under

$600,000 between the purchase price and the amount of the loan was to be remitted to petitioner. Wilder advised Willey that the loan could not close with the additional proceeds going to the borrower. On Willey's advice, petitioner directed the title company to change the papers and to create a second settlement statement indicating that the excess funds would go to another corporation, Foxhall, Inc., purportedly to pay off a second lien on the property. In fact, there was no such second lien, and petitioner had signatory authority on Foxhall's checking account. The Bedford Savings records contained a promissory note to Foxhall signed by petitioner for $600,000, apparently intended to support the false representation that Foxhall had a second lien on the property. Pet. App. 16a-17a; Gov't C.A. Br. 4-5 & n.4.

Petitioner directed the disposition of the approximately $600,000 in excess funds received from Bedford Savings. Petitioner sent $200,000 to Willey, who, in turn, gave $100,000 to Wilder for his aid in securing the loan. Petitioner transferred the remainder of the excess funds, approximately $364,000, out of a Foxhall account to purchase certificates of deposit at another bank. Pet. App. 17a; Gov't C.A. Br. 5-6.

2. Petitioner's conviction for violating 18 U.S.C. 1014 was based on his false representation to Bedford Savings that approximately $564,000 of the loan would be used to pay off a second lien on the Dizbo property. Pet. App. 76a-77a.[1] The court instructed the jury

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[1] Petitioner's bank fraud conviction is discussed at page 4, *infra*. Petitioner's money laundering convictions were based upon later financial transactions in which he engaged with the excess funds. Petitioner's conspiracy conviction was based upon his conspiracy to commit bank fraud and money laundering, to make false statements to the bank, and to commit

that to convict petitioner of that offense, the government was required to establish (1) that Bedford Savings was federally insured; (2) that petitioner made a false statement to Bedford Savings knowing the statement was false; and (3) that petitioner made the false statement for the purpose of convincing Bedford Savings to give him a loan. The court did not instruct the jury that the materiality of the false statement was an additional element of the offense. Petitioner did not object to those instructions at trial. *Id.* at 52a-53a.

3. On May 26, 1995, the court of appeals affirmed petitioner's convictions. Pet. App. 1a-10a. It held that the evidence on all counts was sufficient, and rejected petitioner's claim that his false representation that Foxhall had a lien on the Dizbo property was not materially false. *Id.* at 7a (holding that petitioner's false statement was "clearly material"). The court of appeals also held that petitioner's convictions for bank fraud (18 U.S.C. 1344) and for making a false statement to the bank (18 U.S.C. 1014) were not multiplicitous, because petitioner's "submission of false statements was not the sole basis for the bank fraud count." Pet. App. 10a. Rather, the court noted, the bank fraud conviction was based upon a broader "course of fraudulent conduct that was intended to secure the loan." *Ibid.*

On June 19, 1995, while petitioner's petition for rehearing was pending in the court of appeals, this

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bank bribery (18 U.S.C. 215(a)(1)). Pet. App. 70a-79a. Petitioner was acquitted on Count 4, which alleged a substantive count of bank bribery involving the $100,000 payment from Willey to Wilder in connection with the Dizbo property loan. Gov't C.A. Br. 2 n.1.

Court ruled in *United States* v. *Gaudin*, 115 S. Ct. 2310, that where the materiality of a false statement is an element of an offense, the statement's materiality is to be determined by the jury, not by the court. Following the decision in *Gaudin*, petitioner filed an additional letter brief with the court of appeals raising for the first time a claim that the trial judge had erred in not requiring the jury to determine whether the false statement to Bedford Savings alleged to violate 18 U.S.C. 1014 was material. Pet. App. 45a-48a. The government argued in response that materiality is not an element of an offense under 18 U.S.C. 1014, and that, in any event, there was no plain error. Pet. App. 50a-55a. The court of appeals thereafter issued an order clarifying two factual statements in its initial opinion but otherwise denying rehearing. *Id.* at 31a-32a. The court of appeals did not address the merits of the *Gaudin* claim belatedly raised by petitioner. *Ibid.*

DISCUSSION

1. Petitioner argues that materiality is an element of the offense described by 18 U.S.C. 1014 and that his conviction must be reversed because the district court did not instruct the jury that it must find that his false statement was material in order to convict. That contention lacks merit.

In *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), this Court held that, where the materiality of a false statement is an element of an offense, the statement's materiality is to be determined by the jury, not by the court.[2] Materiality of the alleged false statement,

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[2] To be material, a statement must have "a natural tendency to influence, or [be] capable of influencing, the decision of the

however, is not an element of Section 1014. Section 1014 authorizes the conviction of whoever "knowingly makes any false statement," where that statement is made "for the purpose of influencing in any way the action" of covered financial institutions (including the federally insured bank involved here) on loans or other specified transactions. The language of Section 1014 does not require that the false statement also be material.

Because Congress defines the elements of an offense through the language of the statute, Section 1014 does not support the conclusion that materiality is an element of that offense. See *Staples* v. *United States*, 114 S. Ct. 1793, 1796 (1994) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.") (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986) ("[I]n determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is usually dispositive."). Indeed, this Court reached a similar conclusion in *Kay* v. *United States*, 303 U.S. 1, 5-6 (1938), in construing a statute that was a direct predecessor of Section 1014 and that contained identical pertinent language.[3]

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decisionmaking body to which it was addressed." *Gaudin*, 115 S. Ct. at 2313.

[3] *Kay* involved a prosecution under former 12 U.S.C. 1467(a) (1946) (repealed 1948), which provided for punishment of "[w]hoever makes any statement, knowing it to be false, * * * for the purpose of influencing in any way the action of the Home Owners' Loan Corporation * * * upon any * * * loan." See 303 U.S. at 3 n.1.

The courts of appeals are divided on whether materiality is an element of Section 1014. In *United States* v. *Cleary*, 565 F.2d 43, 46 (2d Cir. 1977), cert. denied, 435 U.S. 915 (1978), the court held that materiality is not an element of Section 1014. The other courts of appeals, however, including the court below, have listed materiality as an element of Section 1014.[4] Because of that conflict, which has taken on increased significance now that materiality is a jury issue, we have filed a petition for a writ of certiorari presenting that issue in *United States* v. *Wells*, 63 F.3d 745 (8th Cir. 1995), petition for cert. pending, No. 95-1228 (filed Jan. 31, 1996).[5]

This case, however, does not supply an appropriate vehicle to resolve that question. Because petitioner failed to object to the district court's decision not to send the issue of materiality to the jury, the sole question presented would be whether that decision

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[4] See, *e.g.*, *United States* v. *Nash*, 64 F.3d 504 (9th Cir. 1995); *United States* v. *Wells*, 63 F.3d 745 (8th Cir. 1995), petition for cert. pending, No. 95-1228 (filed Jan. 31, 1996); *United States* v. *Spears*, 49 F.3d 1136, 1141 (6th Cir. 1995); *United States* v. *Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992); *United States* v. *Concemi*, 957 F.2d 942, 951 (1st Cir. 1992); *United States* v. *Haddock*, 956 F.2d 1534, 1549 (10th Cir.), cert. denied, 506 U.S. 828 (1992); *United States* v. *Rapp*, 871 F.2d 957, 964 (11th Cir.), cert. denied, 493 U.S. 890 (1989); *Theron* v. *United States Marshal*, 832 F.2d 492, 496 (9th Cir. 1987), cert. denied, 486 U.S. 1059 (1988); *United States* v. *Ryan*, 828 F.2d 1010, 1013 n.1 (3d Cir. 1987); *United States* v. *Thompson*, 811 F.2d 841, 844 (5th Cir. 1987); *United States* v. *Bonnette*, 663 F.2d 495, 497 (4th Cir. 1981), cert. denied, 455 U.S. 951 (1982). But see *United States* v. *Cleary*, 565 F.2d at 46.

[5] We have provided a copy of our petition in *Wells* to petitioner.

was plain error in light of the particular facts of this case. See *United States* v. *Olano*, 113 S. Ct. 1770, 1775-1779 (1993) (appellate court may consider claims of error not raised below only if error is "clear" and "obvious" under current law, and will not reverse unless the error affected substantial rights and unless failure to reverse would result in a miscarriage of justice that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings").

Moreover, petitioner fails to establish plain error. First, any error in the decision not to submit the issue of materiality to the jury in this case was not "clear" or "obvious" under then-current law.[6] Nor was petitioner prejudiced by such error, because the false representation that he made to Bedford Savings regarding Foxhall's entitlement to the loan proceeds was patently material to its loan decisions, as both the district court (Pet. App. 20a-21a) and the court of appeals (*id.* at 6a-7a) found. Moreover, to convict, the jury necessarily concluded that petitioner made the false statement for the specific purpose of influencing the action of Bedford Savings on the loan.[7] It is

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[6] On the contrary, at the time of trial and even at the time of the court of appeals' decision (issued about one month before this Court's decision in *Gaudin*), it was neither clear nor obvious that if materiality was an element of a false statement offense it should be decided by the jury. Rather, the weight of authority was that the materiality determination in false statement cases was a question for the court. See, *e.g.*, *United States* v. *Thompson*, 811 F.2d 841, 845 n.4 (5th Cir. 1987).

[7] The district court observed in part that (Pet. App. 20a-21a):

> The settlement forms, which could have set the record straight as to the purpose of the loan, and also could have provided a basis for the bank to recall or change the con-

difficult to imagine a jury finding such intent while at the same time regarding the false representation as incapable of influencing the bank's actions. Finally, even assuming clear error, petitioner's conviction under Section 1014 did not amount to a "miscarriage of justice" warranting reversal, *Olano*, 113 S. Ct. at 1778-1779, given the jury's finding that petitioner sought to influence the lending decision of Bedford Savings through his false statement, and the findings by both the district court and the court of appeals that petitioner's false representation was in fact material. Pet. App. 7a, 20a-21a.

In sum, we believe that materiality is not an element of the offense described in Section 1014, and, even if it is an element, the failure to instruct on materiality in this case did not rise to the level of plain error. Nevertheless, because the proper disposition of this case could be affected by the resolution of *United States* v. *Wells*, *supra*, the petition here should be held for that case. If the Court grants the petition in *Wells*, the petition here should be disposed of in light of the Court's decision in *Wells*. If, however, the Court denies the petition in *Wells*, the Court should remand this case to the court of appeals for further consideration in light of *Gaudin*.[8]

> ditions on the loan, again concealed and misrepresented the purpose of more than one-quarter of the loan. One of the bank employees involved in approving the loan testified that the bank would not have loaned [petitioner] the money knowing that part of the funds were to be used to make a loan to a second company. The Court determines that under the circumstances, the false statement on the settlement forms was material.

[8] That disposition would be consistent with the dispositions in other cases in which this Court has granted the petition,

2. Petitioner also contends (Pet. 26-29) that Count 2, charging bank fraud in violation of 18 U.S.C. 1344, and Count 3, charging petitioner with making a false statement to the bank in violation of 18 U.S.C. 1014, are multiplicitous, and that his conviction and punishment on both counts therefore violates the Double Jeopardy Clause.[9]

In the context of a single prosecution, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri* v. *Hunter*, 459 U.S. 359, 366 (1983); see *Albernaz* v. *United States*, 450 U.S. 333, 344 (1981). Thus, the question whether multiple convictions arising from a single prosecution violate the Double Jeopardy Clause is solely one of legislative intent. See, *e.g.*, *United States* v. *Woodward*, 469 U.S. 105, 108-109 (1985) (per curiam); *Albernaz*, 450 U.S. at 340. In federal prosecutions, it is presumed in the absence of evi-

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vacated the judgment, and remanded to the court of appeals for further consideration in light of *Gaudin*, despite the fact that the issue would be reviewed by the court of appeals only for plain error. See *Gatewood* v. *United States*, 116 S. Ct. 510 (1995) (conviction under 18 U.S.C. 1001); *Waldron* v. *United States*, 116 S. Ct. 333 (1995) (conviction under 18 U.S.C. 1014); *Knapp* v. *United States*, 116 S. Ct. 666 (1995) (conviction under 26 U.S.C. 7206).

[9] The sentence of 24 months' imprisonment imposed on Count 3 was ordered to run concurrently with the sentence of 46 months' imprisonment imposed on each of the other counts of conviction, including Count 2. The sentence on Count 3 is not concurrent with the sentence imposed on Count 2 only with respect to the $50 special assessment imposed on each count of conviction. Pet. App. 28a-30a. See *Ray* v. *United States*, 481 U.S. 736 (1987) (concurrent sentence doctrine inapplicable where separate special assessment imposed on each count).

dence to the contrary that Congress intends to permit multiple convictions for a single act that violates two statutes if each statute "requires proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932); see *United States* v. *Dixon*, 113 S. Ct. 2849, 2856 (1993). Under the *Blockburger* test, the statutory elements of the offense govern; the fact that in a particular case there was an overlap in the proof offered to establish the crimes is irrelevant. *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975).

Sections 1014 and 1344 describe separate offenses under the *Blockburger* test. A conviction under Section 1014 requires proof of facts not required to prove bank fraud. Specifically, to violate Section 1014, a defendant must have made a false statement, and that false statement must have been made for the purpose of influencing the bank's action on a loan or other specified financial transaction. Proof of a false statement intended to influence a loan decision is not necessarily required for a conviction under the Section 1344 bank fraud statute. Similarly, a conviction under Section 1344 requires proof of a specific intent to defraud, while Section 1014 requires only an intent to induce action on the part of the bank, without the necessity of an intent to defraud.

Petitioner's reliance (Pet. 26-29) on *United States* v. *Seda*, 978 F.2d 779 (2d Cir. 1992), is misplaced. In *Seda*, the Second Circuit held that an indictment was multiplicitous in charging the defendant with violating Section 1344, and in separate counts with violating Section 1014, where both sets of charges were based upon the same false statements alleged to have been made to a bank. 978 F.2d at 780-782. We disagree with that holding, for the reasons set forth in the

dissenting opinion in *Seda*. As the dissent explained, the majority in *Seda* erred when, in applying the *Blockburger* test, it considered the facts of the case before it. 978 F.2d at 782-783 (Kearse, J., dissenting). In any event, as both courts below observed, *Seda* is distinguishable because the Section 1344 bank fraud charge in this case was not based solely on the specific false representation that formed the basis for the Section 1014 count, but was based on a continuing course of fraudulent conduct over several months. Pet. App. 10a, 14a; see *id.* at 75a-77a.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petition in *United States* v. *Wells*, and then disposed of accordingly.

Respectfully submitted.

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